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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

JEROME H. LOUCHHEIM, III, *Petitioner,*

v.

THE STATE OF NORTH CAROLINA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETER M. FOLEY
Ragsdale & Liggett
Branch Banking and Trust Building
Post Office Box 349
Raleigh, North Carolina 27602

DAVID E. KENDALL
Williams & Connolly
Hill Building
Washington, D.C. 20006

PHILIP W. AMRAM
Wolf, Block, Schorr & Solis-Cohen
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina, rendered January 4, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 296 N.C. 314, 250 S.E.2d 630 (1979) and is set forth in the Appendix. The opinion of the North Carolina Court of Appeals is reported at 36 N.C. App. 271, 244 S.E.2d 195 (1978) and is set forth in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1970), the petitioner having asserted below

and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of North Carolina was entered on January 4, 1979, and this petition is filed within the period authorized by order of this Court dated March 22, 1979, Application No. A-822.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Under the Fourth Amendment, is there probable cause for the issuance of a warrant to search the premises of an ongoing business to find incriminating business papers where the affidavit in support of the application states that the papers which are the object of the search were last seen on the premises fourteen months before, and further that the State authorities had been conducting an intensive investigation on the business premises with respect to the transactions covered by these papers for more than the past two weeks?

2. Is there a presumption that incriminating business papers are permanently retained in the files of a business and are never removed by the owner or destroyed, because the records of the business might be audited at some time in the future?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Much of the history of this proceeding will be found in the opinion of the Supreme Court of North Carolina attached. (App. p. 25 *et seq.*)

With respect to this Petition, and the Fourth Amendment question presented, the following are the relevant facts.

Petitioner was the president and principal stockholder of Capital Communications, Inc., which later changed its corporate name to Louchheim, Eng and People (hereinafter "C.C.I."). (App. 26, 30)

C.C.I. entered into a one-year contract with the State of North Carolina for the period July 1, 1973 to June 30, 1974 (App. 26; R. 53) to handle the advertising of the State for industrial development. C.C.I. was to receive the customary 15% commission on advertising placed, plus reimbursement for actual production expenses of necessary art, layout and copy work purchased by C.C.I. from outside sources.

A second one-year contract was made for the period July 1, 1974 to June 30, 1975 and a third one-year contract was made for the period July 1, 1975 to June 30, 1976. (App. 26)

The volume of business under the contracts averaged between $350,000 and $500,000 a year, or over one million dollars for the total three year period. (R. 53, 116)

Petitioner was indicted on eight separate charges of feloniously obtaining property from the State by false pretense and on one charge of conspiracy to commit felonious false pretense. (App. 25-6; R. 1-14)

The alleged crime was of primitive simplicity. C.C.I. from time to time purchased art, layout and copy work from a Florida firm called Ad Com International (hereinafter "Ad Com"). It was alleged that, when Ad Com rendered bills for this material, Petitioner, as president

of C.C.I., directed the preparation of falsely "written up" bills to the State in larger amounts, for reimbursement under the contracts, which bills were paid by the State. Further, Petitioner directed an employee of Ad Com to prepare new Ad Com bills to match the "written up" bills which had been rendered to the State. (App. 28)

The eight false pretense indictments were each dated 28 June, 1976, each based upon a specific different overcharge of the State on an Ad Com billing. The court non-suited the State on one indictment and the jury found Petitioner innocent on three indictments. (App. 29-31) No further discussion of these is relevant here.

The jury found Petitioner guilty on four false pretense indictments, as follows:—

(1) A "write up" of $374.78 on a bill to the State of $38,254.98 on 22 August, 1973, paid by the State on 30 August, 1973. (R. 158-9)

(2) A "write up" of $628.12 on a bill to the State of $11,198.68 on 10 October, 1973, paid by the State on 16 October, 1973. (R. 160-1)

(3) A "write up" of $239.00 on a bill to the State of $24,972.94 on 4 December, 1973, paid by the State on 19 December, 1973. (R. 161-2)

(4) A "write up" of $370.00 on a bill to the State of $23,410.45 on 11 January, 1974, paid by the State on 17 January, 1974. (R. 163)

The jury also found Petitioner guilty on an indictment dated 28 June, 1976, for conspiracy, as having conspired with the president of Ad Com to accomplish the "write up" of the bills. (R. 2, 153-7)

All of the transactions covered by the four false pretense indictments related to the first contract, which covered the period July 1, 1973 to June 30, 1974.

The Supreme Court of North Carolina held that the State's evidence, which satisfied the burden of proof to convict the Petitioner on the four false pretense counts and the conspiracy count, was a document identified as State Exhibit 24 which provided circumstantial evidence "from which a jury could reasonably infer that false representations were made." (App. 42-3)

That document was obtained by the State solely as the result of a search of the offices of C.C.I. pursuant to the search warrant issued 25 May, 1976. (R. 72)

The facts relating to the search warrant are as follows:

In December of 1974 and January, 1975, some six months after the termination of the first contract on June 1974, the State Auditor of North Carolina conducted an audit of C.C.I. (R. 64-6) This audit covered the entire period of the first contract, 1973/4 and the first six months of the 1974/5 contract. Because of what the auditors described as "atrocious" bookkeeping and "regular confusion" on the part of both the State and C.C.I. (R. 55), a series of adjustments were made for overbillings and underbillings. These resulted in a net debt of C.C.I. to the State of $10,907, (App. 27; R. 69) which was duly paid by C.C.I. to the State. Of this amount, $1,135 related to the Ad-Com account. (R. 70)

The bulk of the mistakes represented a difference between an estimated insertion rate with the media which turned out to be actually different when the

advertising ran. This resulted in "an undercharge or overcharge to the State". (R. 66-7)

Nothing further happened with respect to the completed 1973/4 contract for a period of more than a year.

In February, 1976, a second audit was made by the State which covered the whole of the 1973/4 contract, the whole of the 1974/5 contract and the first six months of the 1975/6 contract. (R. 66, 70) The total amount of adjustment was $2,916.00, which C.C.I. repaid to the State. (R. 71) The audit result contained no allocation of the $2,916.00 as between the three different contracts.

On 25 May, 1976, almost two years after the termination of the 1973/4 contract, a special agent of the State Bureau of Investigation filed an application for a search warrant for the books and records located in the offices of C.C.I., accompanied by his affidavit in support, which averred:

> (1) a contract had been made between C.C.I. and the State dated July 1, 1973;
>
> (2) the affiant had interviewed a "confidential informant" on 28 April, 1976 and 3 May 1976, later identified as Ms. Toni Brennan, a former employee of Ad Com and subsequently of C.C.I.;
>
> (3) the confidential informant advised him that C.C.I. "maintained two different sets of invoices" respecting Ad Com production costs, namely, the "true" Ad Com bills, and the "untrue and inflated" bills which had been submitted to the State;
>
> (4) these bills antedated March, 1975, which was the last date they had been seen by the confidential informant;

> (5) following these interviews with the confidential informant, Petitioner on 7 May, 1976 agreed to allow State investigators to examine C.C.I.'s records, including records and invoices of the 1973 contract. (The affiant did not state that the records of the 1973 contract had already been audited twice by the State in January, 1975 and in February, 1976);
>
> (6) Petitioner on 13 May, 1976 delivered to the affiant the original Ad Com bills and copies of the C.C.I. bills to the State for the 1973/4 period to permit examination and expert opinion as to the identity of the typewriter on which they had been prepared. (R. 20-6)

The affidavit also asserted that a Mrs. Justice, a former employee of C.C.I., had seen "approximately two weeks ago . . . two sets of incompatible and different invoices from Ad Com" in C.C.I.'s offices. This statement was admittedly false as to both parts and the State so conceded. (R. 28-9, 32, 36, 38-9). The North Carolina Supreme Court, under the rule of *Franks* v. *Delaware,* 438 U.S. 154 (1978), disregarded this false material in this affidavit. (App.) This issue has no relevance to the present Petition.

On the basis of this affidavit the magistrate found:

> "that there is probable cause to believe that the property described in the application on the reverse hereof and related to the commission of a crime is located as described in the application,"

and issued a search warrant on 25 May, 1976. (R. 19)

The magistrate did not confine the search warrant to the duplicate sets of invoices as described by Ms.

Toni Brennan in the affidavit but authorized an all-embracing search of:

> "corporate minutes, bank statements and checks, sales invoices and journals, invoices, and other books and documents kept in the course of business by Louchheim . . . . and Capital Communications, Incorporated, of North Carolina during all periods . . . [they] were under contract to perform any advertising service for the State of North Carolina. . ." (R. 20)

The State agents and the district attorney then conducted a six-hour search of Petitioner's office that same day (R. 37) during which a large volume of documents was seized, including personal files and records of Petitioner and his wife which had nothing to do with the C.C.I. contracts. The seizure was so all-inclusive as to require the virtual closing of the business. (R. 17)

Petitioner moved on 16 June, 1976, to quash the search warrant and to suppress and secure the return of the seized items on the grounds, *inter alia*, that the warrant was issued without probable cause and that the affidavit was defective and untruthful. (R. 15-19) On 15 July, 1976, a hearing was held on this motion. The State stipulated that the search warrant was issued "only on the basis of the affidavit attached to it and no other information." (R. 31)

With respect to the averments in the affidavit relating to Mrs. Justice, the State's witnesses conceded that the statements attributed to her respecting "incompatible" invoices were "an embellishment" of her statements and that there was "no attempt to quote her". Further, the State's witnesses confirmed that she had given no date on which she had last seen the invoices. She testified that she had "no idea" whether the in-

voices were different or identical and that she had last seen them in January, 1974, more than two years before the date of the affidavit. (R. 28-9, 32, 36, 38-9)

The trial court denied Petitioner's motions, ruling that the search and seizure were not unreasonable or in violation of the Fourth Amendment because "the search warrant was based on an affidavit which was sufficient to support the magistrate's finding of probable cause." (R. 39-40)

In the manifold documents seized in the all-embracing search, there was not a single set of double Ad Com invoices, one "true" and one "untrue and inflated", as described by Ms. Toni Brennan in the affidavit for the search warrant. None were offered in evidence by the State at the trial.

On the other hand, a single ledger sheet was found (State Exhibit 24) which gave the State circumstantial evidence to support a charge of "overbilling" the State on the Ad Com invoices. (R. 72; App. 42-3)

This document was not a ledger sheet of C.C.I. but was a ledger sheet of Ad Com, prepared by Toni Brennan when she was working for Ad Com. She stated that it contained a record of the amount of Ad Com's billings to C.C.I. which she entered in the debit column when she typed up the bills as an Ad Com employee. The amounts in the credit column indicate checks received from C.C.I. (R. 81)

No explanation was offered by Ms. Brennan of the presence of this Ad Com ledger sheet in C.C.I.'s office. She said that it "appears to have come over the facsimile machine." (R. 81)

The trial lasted for ten days. The State relied heavily on Exhibit 24, which was admitted over objection of the Petitioner. (R. 88)

The State's witness, Wheeler, who testified as an expert accountant and auditor, relied exclusively on Exhibit 24 as evidence of overcharges on the false pretense counts on which Petitioner was convicted. (R. 92-3)

The court, in its charge to the jury, included a specific reference to Exhibit 24 in each separate analysis of each false pretense count on which Petitioner was convicted. (R. 158, 160, 161, 162)

On the three false pretense counts, not covered in Exhibit 24, Petitioner was acquitted by the jury. (R. 164, 165, 166, 171, 175)

The jury found the Petitioner guilty on four false pretense counts, totalling $1,611.90 and on the conspiracy count. (R. 175) The court sentenced Petitioner to four years on the conspiracy count and suspended a five-year sentence on the four false pretense counts. (R. 172)

Judgment was affirmed by the North Carolina Court of Appeals (App. 45-60) and by the Supreme Court of North Carolina. (App. 25-44)

The Supreme Court of North Carolina relied exclusively on State Exhibit 24 as the basis for its conclusion that "there was sufficient evidence from which a jury could reasonably infer that false representations were made." (App. 42-3)

If, as Petitioner contends, the search warrant was invalid under the Fourth Amendment, State Exhibit 24 was inadmissible; and without it, no sufficient evidence was offered by the State to support the conviction of Petitioner.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

On June 16, 1976, Petitioner filed a written, pretrial "Motion to Quash Search Warrant and for Return of Seized Property" (R. 15-9), which alleged, *inter alia,* that the May 25, 1976 search of petitioner's office was violative of the Fourth Amendment because the search warrant "was issued without probable cause". A hearing on this motion was held July 15, 1976, and the trial court thereafter denied the Motion orally (R. 39-41), ruling that "the search warrant was based on an affidavit which was sufficient to support the magistrate's finding of probable cause in that the affidavit specified necessary circumstances adequate to support a finding that a crime had been committed; that evidence of such crime was in the possession of the parties and the premises to be searched and of the basis for believing reliability [sic] the information supplied by the confidential informant" (R. 39-40); that "the affidavit was truthful . . . in that it reported in good faith, although exaggerated, the circumstances relied upon to establish probable cause" (R. 40); that "the scope of the search and the extent of the items seized were authorized by the warrant and reasonably necessary in order to discover the items in the warrant specified," *ibid.*; and that "the warrant sufficiently specified the items to be seized," *ibid.* The trial court entered a substantially similar written order on August 12, 1976. (R. 41-3)

Petitioner objected at the trial to the introduction by the State of any documents obtained by the State as the result of the search, and particularly of State Exhibit 24. (R. 72)

On appeal, Petitioner's first Assignment of Error was that "[t]he Court committed prejudicial error in denying defendant's motion to prohibit the introduction at trial of items seized in the search of May 25, 1976, at the premises of Louchheim, Eng and People". (R. 182) Petitioner briefed this as a Fourth Amendment contention because, *inter alia,* the information of the informant was fourteen months old (Brief of Defendant Appellant at 9-31, *State* v. *Louchheim,* N.C. Ct. App. No. 7710SC909-10th Dist.) The North Carolina Court of Appeals rejected petitioner's argument, ruling that the lapse of 14 months was not excessive because "such records are usually kept for years" and relying upon *Andresen* v. *Maryland,* 427 U.S. 463 (1976). (App. 52-4)

Petitioner obtained discretionary review in the Supreme Court of North Carolina pursuant to N.C. Gen. Stat. § 7A-31, and again contended that the May 25, 1976, search was violative of his Fourth Amendment rights for want of probable cause due to the fourteen months gap. (Brief for Appellant at 3-11, *State* v. *Louchheim,* No. 7710SC909-10th Dis.) The Supreme Court of North Carolina affirmed, rejecting the Fourth Amendment claim and sustaining the search warrant in the face of the fourteen-month gap. (App. 33-6)

REASONS FOR GRANTING THE WRIT

1. This Petition raises questions of national importance, never before dealt with by this Court, respecting

the limits of searches and seizures of a person's business papers under the Fourth Amendment.

This case is unique and no case like it has been considered by this Court or by any Court of Appeals.

This case not only raises novel questions of "staleness" in connection with the affidavit for the issuance of a search warrant, but more importantly raises the question of the validity of a new doctrine of probable cause, invented by the Supreme Court of North Carolina, for the search of business papers.

2. The affidavit in support of the search warrant in this case asserted that incriminating business papers of the Petitioner had last been seen at his business office fourteen months ago.

The affidavit further stated that the North Carolina State authorities had been conducting an intensive investigation of the Petitioner and of his business, with respect to the exact transactions covered by the papers in question, for more than two weeks prior to the date of the affidavit. Petitioner had cooperated with the State authorities in the investigation and had furnished them with a substantial number of documents.

3. Neither this Court, nor any Court of Appeals, nor any District Court, has ever sustained a search warrant for business papers, based on an assertion that the object of the search was currently under intensive investigation and had last been seen on the premises to be searched fourteen months previously.

We have found four federal cases on this issue. The Court of Appeals of the District of Columbia, in April, 1963, in *Schoeneman* v. *United States,* 317 F.2d 173 (1963), set aside a search warrant for business papers where the affidavit stated that the incriminating papers

had last been seen, on the premises to be searched, 107 days prior to the application for the warrant. The opinion notes that the Government could not cite, nor could the Court find, any case which sustained such a search warrant issued after more than a thirty day gap. 317 F.2d at 177.

We have found only three federal cases, decided after April, 1963, which have dealt directly with the problem of probable cause and "staleness" with respect to a search of business papers.

United States v. *Forsythe,* 560 F.2d 1127 (3d Cir. 1977) held that a gap of "more than one month" was not excessive.

In *Andresen* v. *Maryland,* 427 U.S. 463 (1976), the prosecution asserted that the accused, a settlement attorney, had defrauded a purchaser of a lot (No. 13T) in a subdivision by representing that the lot was clear of encumbrance, when he knew there were two outstanding liens. An application for a search warrant was filed for permission to search his office, and the office of a corporation which he controlled; the warrant was limited to specified documents pertaining to the sale of the particular lot 13T.

All but a few of the documents seized were either returned or suppressed, and these few were introduced into evidence at the trial.

The bulk of the majority opinion and of the dissent of Mr. Justice Brennan was devoted to a Fifth Amendment issue not present in this case. Almost all of the discussion of the Fourth Amendment was devoted to the problem of general warrants and the application of *Warden* v. *Hayden,* 387 U.S. 294 (1967), neither of which is at issue here.

The subjects of probable cause and "staleness" were peripheral issues. The entire opinion of the Court on these subjects is a footnote 9 to Mr. Justice Blackmun's majority opinion. 427 U.S. at 478-9. Justice Brennan's dissent does not mention it. Half of this footnote is devoted to the reliability of the information in the warrants, which is not at issue here. On "staleness", there is but a single paragraph, less than half the footnote.

In *Andresen,* there was a "three month delay between the completion of the transactions on which the warrants were based, and the ensuing searches." *Ibid.* The opinion held that it was reasonable to believe that the records respecting Lot No. 13T were still in Andresen's office at the time of the search because he had secured a release on Lot No. 13T with respect to one lienholder only three weeks before the searches and another lien remained to be released. The footnote expressed no opinion on whether the three-month gap would have been sustained in the absence of the recent action within three weeks of the date of the affidavit.

On its face, this bears no resemblance to the present case, where there was a more than fourteen-month gap between the transactions on which the warrants were based and the ensuing searches, and there was no assertion in the affidavit that any new action was taken during the fourteen-month period by the Petitioner.

United States v. *Midtaune,* 589 F.2d 370 (8th Cir. 1979), (petition for certiorari filed, March 23, 1979) discussed only the sufficiency of the substantive averments of the affidavit. The opinion says nothing about the passage of time or "staleness".

4. A fundamental requirement for a valid warrant is that it be reasonable to presume that the objects, seen at some previous time on the premises, will still be there on the same date the warrant issues, and will not have been removed or destroyed. Where there is a significant time gap between the last date the objects were seen and the date of the affidavit, an explanation of the delay must be furnished to sustain the search warrant. This explanation will be founded on the nature of the property, the nature of the crime alleged, and whether it can be assumed that the property will have been removed or disposed of in the interim. *Sgro* v. *United States*, 287 U.S. 206, 210 (1932); *United States* v. *Johnson*, 461 F.2d 285, 287 (10th Cir. 1972); *United States* v. *Steeves*, 525 F.2d 33, 38 (8th Cir. 1975); *United States* v. *Brinklow*, 560 F.2d 1003, 1005 (10th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978).

Of particular importance is the nature of the object and whether it is "consumable" and therefore "less likely to remain in one place". *United States* v. *Steeves*, *supra*.

The objects in this case are a small handful of invoices issued by Ad Com to C.C.I. prior to March, 1975. What reasonable assurance was there that they would not have been removed or destroyed during the fourteen months between March, 1975 and May, 1976? And particularly during the two weeks the State authorities were in Petitioner's office actively investigating the Ad Com account?

The short answer is that, under the facts of this case and the content of the affidavit, there was no possibility at all that the invoices would have been in Petitioner's business files on May 25, 1976. (This was, of course,

confirmed by the fact that no such invoices were found in the massive search.)

If ordinary "commonsense," *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965), and "the factual and practical considerations of everyday life," *Brinegar* v. *United States,* 338 U.S. 160, 175 (1949), are the touchstones in probable cause cases, how can it be reasonably probable that Petitioner would carefully keep the incriminating "true" invoices in his office files, so that they would be there when the contractual audit took place? *A fortiori,* if they had been kept for some strange reason until April, 1976, would they still be kept after the State began an intensive investigation in Petitioner's office of the C.C.I.-Ad Com relationships in early May, 1976, some two weeks before the date of the affidavit?

The inevitable "commonsense" probability can only be that the "true" invoices, if they ever existed, would have disappeared from Petitioner's files long before April, 1976, and most certainly in early May, 1976, when the State's auditors and investigators descended on Petitioner's office.

5. How then did the Supreme Court of North Carolina sustain the validity of the warrant and the search? It did so by:—

> (a) directly violating the basic principle that probable cause must be based on the affidavit presented to the magistrate and may not be based, by hindsight, on what later develops at the trial. *Sgro, supra; Schoeneman, supra; Durham* v. *United States,* 403 F.2d 190 (9th Cir. 1968); *United States* v. *Harris,* 412 F.2d 796 (6th Cir. 1969) *rev'd on other grounds,* 403 U.S. 573 (1971);

United States v. *Rahn*, 511 F.2d 290 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

(b) inventing a new and dangerous doctrine of probable cause with respect to business papers which presents disastrous consequences to America's businesses, large and small, and substantially annuls the Fourth Amendment with respect to business papers.

It is this new doctrine and its consequences which are the main thrust of this Petition.

Four reasons were advanced by the Court to support its conclusion that the incriminating papers would probably still be on the premises fourteen months later:—

(a) "the alleged crime is a complex one taking place over a number of years";

(b) "the place to be searched is an ongoing business";

(c) "the invoices . . . were kept in these offices in compliance with the State advertising contract";

(d) "the items to be seized included corporate minutes, bank statements and checks, sales invoices and journals, ledgers, correspondence, contracts . . . and other books and documents kept in the course of business . . . during all periods which said corporations were under contract to perform any advertising services [for] the State of North Carolina." (App. 35)

6. The first reason is a perfect illustration of the clarity and omniscience of hindsight. There is not a word in the affidavit to support this assertion; what support it may have comes from material developed at the trial.

So far as the affidavit defines the alleged crime, far from being "complex", it was of utmost simplicity. Each offense, if there was more than one, consisted of two pieces of paper, a "true" invoice from Ad Com to C.C.I. and a fictitious "written up" invoice on Ad Com stationery submitted by C.C.I. to the State. Since the State had possession of the "written up" invoice, the only incriminating document, as to any offense, was a single piece of paper, the "true" Ad Com invoice, which had been secreted and never disclosed to the State. The crime as described in the affidavit took place over a relatively short period. The only contract referred to in the affidavit is a contract between C.C.I. and the State dated July 1, 1973. The "confidential informant" said she had typed the fictitious "written up" invoices at times not disclosed in the affidavit, and had last seen them in the office of the Petitioner in March, 1975. These could not have been typed until Ad Com had rendered substantial services some months after the contract began in July, 1973 and they were all typed sometime before March, 1975.

There is absolutely no support in the affidavit for the statement that "the alleged crime is a complex one taking place over a number of years."

7. The fourth reason is a masterpiece of illogic. The affidavit refers to specific and identifiable invoices as the evidence of the crime last seen fourteen months before in Petitioner's office.

The issue is whether there was, fourteen months later, probable cause that these invoices were still in the office and had not been destroyed or moved in the interim, particularly in the face of the ongoing investigation by the State in Petitioner's office. The North

Carolina court found there was probable cause, on the ground that the applicant sought a search warrant for a wide search of the premises (it reads like a "general warrant") to seize every kind of business paper of the Petitioner, in no way confined to the specific and identifiable invoices recited in the affidavit.

This is a classic non-sequitur. How can the breadth and scope of the requested search bear on the probability that the specific invoices identified in the affidavit will be there after fourteen months? The North Carolina court gives no hint.

8. The second and third reasons delimit the North Carolina court's new and dangerous doctrine which annuls the Fourth Amendment's protection of business papers from unreasonable searches and seizures.

The Court's reasoning creates a presumption that, if any businessman continues to run an "ongoing business" and has a contract which provides for the retention of documents for future audit, he will keep carefully in his files for an indefinite period evidence to prove that he has submitted false invoices under the contract.

This presumption operates without time limits. In this case, the invoices were presumably kept in the files in excess of fourteen months. The time could just as readily be twenty-four months or thirty-four or forty-four if there is an ongoing business and a contract to keep papers for future audit.

As pointed out above, each alleged crime consisted of two pieces of paper, a "true" invoice from Ad Com and a "written up" invoice on Ad Com stationery. The latter was submitted to the State in 1973 or 1974,

and the State always had it. The former was always secreted from the State, since if it existed, its disclosure would reveal the alleged offense.

Further, the inevitable presumption and the only reasonable probability is that the "true" invoices, under these circumstances, would never be retained in the files. They could serve no purpose to C.C.I.'s business; they could serve no purpose so far as the State contract was concerned; they could only embarrass C.C.I. if they were disclosed.

Not at all, says the North Carolina court. The fact that C.C.I. was an "ongoing business" and the existence of the contractual provision for audit of the C.C.I.-State contract are determinative. Therefore, says the court, it was reasonably probable on May 25, 1976, that Petitioner would carefully have kept the "true" invoices for the fourteen months after March, 1975 through May, 1976, including the two weeks in May of the investigation in Petitioner's office. The passage of time is immaterial.

The North Carolina court overlooked the critical fact that the "audit" argument was demolished by the State's own witnesses. Donnie Wheeler testified (R. 64-71 incl.) that the State had made a complete audit of the 1973 contract in December of 1974 and January of 1975, *sixteen months* prior to the filing of the affidavit for a search warrant. That audit developed a series of overbillings and underbillings and a final adjustment of the account in favor of the State which C.C.I. had paid in full.

If the account had been fully audited in January, 1975, how was C.C.I. obligated to continue to retain

any papers thereafter for purposes of audit? That obligation under the contract had been fully discharged.

The new doctrine of the North Carolina court holds that there will be a presumption of unlimited retention and no requirement of any reasonable time limit if (a) the business records which are the subject of the search are the records of an ongoing business, and (b) the records are subject to an audit, even though that audit has been made and the account fully adjusted.

This effectively annuls the Fourth Amendment's requirement of "reasonable" searches and seizures and the doctrine against "stale" applications for warrants, when business papers are the object of a search. No longer will it be necessary to follow the doctrine of Chief Justice Hughes in *Sgro, supra,* that the proof of probable cause "must be of facts so closely related *to the time of the issue of the warrant* as to justify a finding of probable cause at that time." 287 U.S. at 210 (emphasis supplied).

The impact of such a doctrine will be disastrous for all businesses, small and large. Unless this decision is reversed, it will only be necessary for a discharged employee to assert that, at some distant time in the past, incriminating business documents were seen in the business files. This in turn will support a wide-ranging search of the papers of the business.

Such a new rule will reverse the holdings of *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344 (1931), *See* v. *City of Seattle,* 387 U.S. 541 (1967), and *G.M. Leasing Corp.* v. *United States,* 429 U.S. 338 (1977), all of which hold that business premises and business

papers are entitled to full Fourth Amendment protection.

If the North Carolina decision remains unreversed, this Court will have put its imprimatur on a new doctrine of probable cause. With respect to the business papers of an ongoing business there will be a presumption that any incriminating papers, seen at *any* time in the businessman's office, will be retained intact by him in his office forever.

This presumption will be further butressed if the business papers are to be subject to future audit. But all businesses are subject to audit, for a period of several years, with respect to both Federal and State tax returns, in addition to any audits required by contract. Accordingly, staleness of a search warrant for business papers can never exist until the passage of the maximum period of years within which an audit of the affairs of the business is lawfully permissible, even though there has already been a full and complete audit.

The principles of *Sgro, supra*, will be effectively repudiated. No longer will the validity of a search warrant be based on a showing that the object of the search was in existence on the premises to be searched within a reasonable short period prior to the request for a search warrant.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted,

PETER M. FOLEY
Ragsdale & Liggett
Branch Banking and Trust Building
Post Office Box 349
Raleigh, North Carolina 27602

DAVID E. KENDALL
Williams & Connolly
Hill Building
Washington, D.C. 20006

PHILIP W. AMRAM
Wolf, Block, Schorr & Solis-Cohen
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Petitioner